

DATE ISSUED: 3-14-97

Case No. 95-ERA-38

In the matter of

WIEB VAN DER MEER,
Complainant

v.

WESTERN KENTUCKY UNIVERSITY,
Respondent

Appearances:

Zachary M. Kafoglis, Esq.
For the Complainant

Deborah Jones Wilkins, Esq.
H. Brent Brennenstuhl, Esq.
For the Employer

RECOMMENDED DECISION AND ORDER

INTRODUCTION

This case arises under the Energy Reorganization Act of 1978, 42 U.S.C. §5851 ("ERA"). The complainant is Dr. Wieb van der Meer, a tenured Associate Professor in the Department of Physics and Astronomy ("physics department") of Western Kentucky University ("WKU" or "the university"), in Bowling Green, Kentucky.

Dr. van der Meer filed a written complaint with the Wage and Hour Division of the United States Department of Labor, dated March 7, 1995, which was received in the Louisville Kentucky Director's Office on April 11, 1995. He alleged that, on February 9, 1995, he had been placed on a forced administrative leave of absence with pay and escorted from his classroom by two campus policemen as a result of his complaints to university administrators and others about a radiation incident that occurred in April, 1994, a subsequent cover up, and inappropriate safety procedures still in effect. (Trial exhibit ("EX") 37, 39, 57). University officials Thomas Meredith, President of the University, Martin R. Houston, Dean of the College of Science and Technology, Charles McGruder, Department Head of Physics and Astronomy, responded to the complaint by taking the position that there was no incident, that a limited test of the university's neutron generator had been performed with the prior knowledge and consent of

state authorities, that Dr. van der Meer was using the test as an excuse to “ruin” the professors involved in the test, Drs. Vourvopoulos and Humphrey, and that Dr. van der Meer had engaged in conduct which was "inappropriate and violative of the Faculty Handbook and University policies." (EX 26, 27, 29). Following an investigation, on June 8, 1995, Department of Labor Investigator Jerry Kaelin recommended finding a violation, and, on June 12, 1995, District Director Donald T. Outland issued a determination letter finding a violation of the ERA. (EX 39, 57). On June 14, 1995, WKU, by counsel, appealed the findings and requested a hearing.

A hearing was held before the undersigned on December 12-14, 1995 at Bowling Green, Kentucky. Both parties were represented by counsel. Eighteen witnesses testified, including the complainant; Drs. William Buckman, Edward Dorman, Richard Hackney, Karen Hackney, Douglas Humphrey, Roger Scott, and George Vorvopoulis, who are also faculty members in the Physics department; Dr. Charles McGruder, Physics department head; Christopher Wheatley, a WKU student; John Smith, WKU's supervisor of the instrument shop in the Thompson complex, which houses the department of Physics and Astronomy; Detective Sergeant Charles Wallace, a campus police officer; Dr. Robert Haynes, WKU's vice-president for academic affairs; Dr. Martin Houston, Dean of Ogden College of Science, Technology and Health; Dr. Gary Dillard, a faculty member in the Biology department; Dr. Charles Hendrikson, a faculty member in the Chemistry department; Dr. Raymond Mendel, a faculty member in the Psychology Department who is also the faculty regent on the WKU Board of Regents; and Dr. Thomas Meredith, president of WKU. Trial exhibits ("EX") 1-32a, 32b-37, 39-67, and 72-84 were received in evidence. A verbatim transcript ("TR") was made, and post-hearing briefs ("Br.") and proposed findings of fact and conclusions of law ("FOF") were received from the parties.

BACKGROUND

WKU is a public institution with an enrollment of approximately 15,000 students and a budget of approximately \$119 million. (EX 67, p. 1). As provided by state law, it is governed by a Board of Regents, composed of eight regents appointed by the Governor and three elected by the faculty, the students, and the staff, respectively. The University President, currently Thomas C. Meredith (and formerly Alexander Kern), is the chief executive officer. Four vice presidents report to him, including the vice president for academic affairs ("academic vice president"), currently Dr. Robert Haynes. Dr. Haynes is responsible for all academic instruction, research, public service and related support offices, and oversees the deans who administer each of the academic colleges and areas of the university. The deans in turn oversee the work of the department heads and faculty members in their areas. The current dean of the Ogden College of Science, Technology and Health, which includes the physics department, is Dr. Martin Houston. Dr. Charles McGruder has been the head of the physics department since August 16, 1993. (EX 2, 67, pp. 3-4, 74-76). Ogden College is located in a building called the Thompson Complex. The neutron generator was initially placed in the basement, in Thompson Complex Central Wing. (TCCW). (TR 355-356).

The complainant, Dr. van der Meer, was born in the Netherlands on April 7, 1950, and received his bachelor's, master's and Ph.D. degrees in physics at the University of Groningen in

the Netherlands in 1972, 1975 and 1979. His specialty is biophysics. His preparation for his master's degree also included work in nuclear physics with radioisotopes at the cancer institute of Amsterdam, and formulation of a computer program evaluating the effects of a nuclear attack on the Netherlands. From 1979 to 1988, he served as a post-doctoral fellow, visiting scientist, and senior research scientist at institutions in the Netherlands and the United States. After receiving excellent recommendations as a talented biophysicist with a strong background in theoretical fluorescence spectroscopy, Dr. van der Meer was appointed to a tenure track position in the physics department at WKU effective August 16, 1988. (EX 56, curriculum vitae, recommendation letters, and letter, president Kern Alexander, to Dr. Haynes, vice president for academic affairs, 4/28/88, TR 64-65). Dr. van der Meer received a promotion to the rank of Associate Professor effective August 16, 1993, was recommended for tenure on December 13, 1993, and, following approval of the recommendation by the Board of Regents on May 10, 1994, received tenure effective August 16, 1994. (EX 56, 77).

Prior to the events which led to his complaint, Dr. van der Meer consistently received excellent faculty evaluations and was enthusiastically recommended for tenure. For 1991, Dr. van der Meer's department head, Dr. Thomas Coohill, rated his teaching, scholarship, professional development, university/public service and overall contribution as outstanding, noted that he was one of their very best in teaching, was well respected by his peers, received outside grant support, published, gave papers at national meetings, was well known and well respected in the fluorescence field, had completed a new departmental brochure, worked hard at recruiting, took his committee assignments seriously, and had built a "solid" lab. For 1992, then interim physics department head Dr. Houston described Dr. van der Meer as a valuable and effective faculty member of the department, noted that Dr. van der Meer had received the highest student evaluation along with another faculty member for the 1992 Fall semester, that he had been awarded two research grants and had five publications and three presentations, that he was a reviewer for an international journal and judge for certain academic competitions, that he was a member of one university and two departmental committees, and that he had attended two professional meetings and was preparing a manuscript for two books. Dr. Houston rated Dr. van der Meer's overall contribution as outstanding. (EX 56). Dean Kupchella approved both the 1991 and 1992 evaluations, and, on the 1992 evaluation, commented that Dr. van der Meer's performance was superior, that it had been great working with him, and thanked him. By the time Dr. van der Meer was considered for tenure, in 1993, Dr. Houston had become acting Dean, replacing Dean Kupchella. Dr. Houston recommended tenure for Dr. van der Meer on December 13, 1993, "without reservations." He declared that Dr. van der Meer had the unanimous support of the tenured faculty and department head, had more than fulfilled the standards established by the department for tenure, and was an outstanding teacher and scholar who was highly involved in public service and professional development. (EX 56).

WKU grants tenure to faculty members at the associate professor level only if they have completed the doctorate or other appropriate terminal degree and have "demonstrate[d] outstanding performance in carrying out their professional responsibilities during the probationary period." (EX 67, p. 17, 10). By statute, tenured faculty members may be dismissed only for cause, consisting of incompetency, neglect of or refusal to perform duties, or immoral

conduct. Proceedings for dismissal can be initiated only upon written charges preferred by the President, after the Advisory Committee on Faculty Continuance makes a "genuine effort ... to resolve the entire matter by informal methods of preliminary inquiry, consultation, discussion, and confidential mediation." The Board of Regents then conducts a hearing and issues a decision. (EX 67, p. 23-25, 29). "Every effort" is also made to resolve faculty grievances "informally by conversation with the Department Head, Dean, or Vice President for Academic Affairs." (EX 67, p. 39).

It is the university's policy to counsel employees on inappropriate behavior before taking any formal action. (TR 839, 840, EX 76).

Dr. van der Meer's whistleblower complaint arises from his concern about radiation leaks from the February 21, 1994 test of a new neutron generator by two other Physics Department faculty members, Dr. George Vourvopoulos and Dr. Douglas Humphrey. These professors testified at trial that, in their opinion, they conducted the test in a safe manner and with the proper license. The purpose of the test was to verify their calculations that the walls, but not the ceiling, of the room where the generator was located were thick enough to protect the researchers and the general public from neutron radiation. Dr. Humphrey testified that, according to state and federal regulations, the general public is allowed to receive no more than 2 MREMs (millirems) of radiation per hour and 100 MREMs per year. (TR 598, 600). The test results showed that the neutron radiation dose rate for the floor above was, in fact, 10 MREMs per hour, which is in excess of the permissible state and federal standards. (TR 604). Neither Dr. Vourvopoulos nor Dr. Humphrey measured the output of gamma radiation, although such radiation would have been produced. (TR 674, 676).

The neutron generator was obtained for the university through a \$400,000 grant from the Department of Energy (DOE's) Oak Ridge National Laboratory to Dr. Vourvopoulos (See EX 60). Dr. Vourvopoulos has been a professor of physics at WKU since 1984, and is also a research adjunct at Oak Ridge National Laboratory, where he had previously worked with a similar neutron generator. Before his appointment at WKU, from 1974 to 1984, he served as head of the nuclear physics division of the Atomic Energy Commission. (TR 782). Dr. Humphrey, the University radiation safety officer, was the co-principal investigator for this grant and reported to Dr. Vourvopoulos (TR 710). Dr. Vourvopoulos has far more grants than Dr. van der Meer (TR 524-525). Dr. Charles Hendrikson, a tenured professor in the chemistry department and former faculty senate executive committee member, testified that there is a tremendous need for money on campus because funding is so meager, and that, in his opinion, professors with large number of grants receive preferential treatment. (TR 261, 262, 265).

Substantial evidence was presented that the physics department at WKU was rife with bitter internecine warfare for years before the events leading to this complaint, and that both Dr. Vourvopoulos and Dr. Humphrey figured heavily in the conflict. Dr. Vourvopoulos was a central figure in the polarization of the department according to both Dr. McGruder and Dean Houston. (TR 509-510, 911-912). He had come to WKU as head of the physics department in 1984 but had been removed from the position in 1987 following a departmental faculty rebellion over his autocratic management style. (TR 236). He was often seen enraged and shouting. (TR

292). He admitted that other members of the physics department might find him confrontational. (TR 809).

In Fall, 1994, Dr. Vourvopoulos refused to return certain student surveys to Dr. Dorman. Dr. Dorman became very angry, and pushed him into a corner shouting "Don't f__k with me." Although Dr. Dorman reported the incident to Dr. McGruder, no action was taken against him. To his knowledge, Dr. van der Meer had not physically touched anyone, as he had Dr. Vourvopoulos. (TR 284-285, 298; EX 22). Similarly, Dr. Scott testified that he had a thirty-minute shouting match with Dr. Vourvopoulos. During the shouting match, Dr. Vourvopoulos stated that he was "very powerful the most powerful person in the university ... more powerful than [the academic vice president]." (TR 375-376, 392).

Dr. Humphrey was an ally of Dr. Vourvopoulos. Dr. Humphrey had, at one point, written a letter to the Dean requesting that funds for the physics laboratory be withheld because Dr. Karen Hackney was the laboratory director. (TR 321). After Dr. Coohill, Dr. Vourvopoulos's replacement as department head, was dismissed by the university for falsifying student evaluations of faculty, Dr. Humphrey also filed a lawsuit against Dr. Coohill. Dr. van der Meer, who considered Dr. Coohill a close friend and mentor (TR 48), felt that the lawsuit was kicking him while he was down. (TR 52). Although Dr. van der Meer was initially perceived as a neutral in the departmental conflicts (TR 287, 304-305), this ended after initiation of the lawsuit against Dr. Coohill and after both Dr. Vourvopoulos and Dr. Humphrey publicly attacked Dr. van der Meer's courses in biophysics as watered down and unsuitable for physics majors. (TR 294, 414-415, 806). Dr. Dorman testified that both Dr. Vourvopoulos and Dr. Humphrey publicly criticized Dr. van der Meer, his courses, and his program. (TR 287-288).

The February 1994 test of the neutron generator was first brought to the attention of the WKU administration by Dr. William Buckman, a semi-retired long-time professor of radiation biophysics. Dr. Buckman is a state approved radiation consultant whose consulting work includes advising local hospitals about the shielding of their x-ray machines. (TR. 239; EX 18). Dr. Buckman was notified that the neutron generator would arrive by a memo from Dr. Humphrey dated January 26, 1994. The memo stated that it was necessary to move a non-operational X-ray unit in order to accommodate the new neutron generator "which is an integral part of the research funded by DOE... ." (EX 4). He testified that he learned that the generator had been operated through a conversation with John Smith in April, 1994, at which Professor Roger Scott was present. Buckman testified that Smith stated that the generator had been turned on, that radiation was detected in an upstairs men's room, and that he was concerned. Although, at trial, Smith denied expressing concern to any professors about the operation of the generator, I credit Buckman's

testimony based on Smith's demeanor and Scott's certainty that the conversation had occurred. (TR 379).

After receiving the memo, Dr. Buckman then went to the basement of TCCW to inspect the neutron generator. It was located in the nuclear laboratory, adjacent to the machine shop.

(TR 238-239). He saw that the machine was set up to run, but did not see sufficient shielding to meet state or federal regulations. It was undisputed that the neutron generator would generate not just neutron radiation, but gamma radiation as well, which is very penetrating and harmful to human beings. (TR 249; TR 125-126). As discussed above, Drs. Vourvopoulos and Humphrey made no measurements of gamma radiation released during the test.

During the week of April 15, 1994, Dr. Buckman contacted Dr. Charles McGruder, the department head, and orally expressed his concern that Drs. Vourvopoulos and Humphrey could not operate the generator safely, and that operation of the generator had violated United States Nuclear Regulatory Commission ("NRC") and State of Kentucky Radiation rules and regulations requiring radiation exposure to employees and the public to be kept as low as reasonably achievable ("ALARA"). He memorialized his concerns in a memorandum dated April 15, 1994, but did not deliver the memorandum to Dr. McGruder until February 9, 1995, the day of Dr. van der Meer's removal from campus. He explained that he had not sent the April 15, 1994 memorandum previously and dropped the issue because he was worried about possible disciplinary action and wanted "to enjoy his semi-retirement." (EX 6, 7).

Dr. Buckman also told Dr. van der Meer about the generator test. (TR 91). On April 19, 1994, Dr. van der Meer formally brought the neutron test to Dean Houston's attention in a written memorandum with a copy to his department head, Dr. McGruder. (EX 8). He had previously complained about the test informally to Dr. Houston. (TR 876). He reported the rumor that Dr. Vourvopoulos, with the permission of Dr. Humphrey, the radiation safety officer, had operated the neutron generator in violation of radiation protection rules for a minimum of 30 minutes raising the possibility of legal consequences, and endangering future grants. He requested an impartial investigation that would exclude Drs. Vourvopoulos and Humphrey, because, since they had been involved in the generator test, they were interested parties. He raised several questions, including whether the generator had been operated, how long, whether and what kind of measurements were performed, whether Dr. Humphrey knew of its operation, what time of day it was operated, whether measurements were performed, when the instruments were calibrated, and whether the neutrons were thermalized. (EX 8). Dr. van der Meer credibly testified that he was concerned and sent the memorandum because of the danger of radiation to students and others. (TR 94-95).

On April 20, 1994, at the request of Dr. Karen Hackney, Dean Houston had a meeting in his office at 1:00 p.m. attended by Drs. Richard and Karen Hackney, Roger Scott and Ed Dorman. She had asked for the meeting to complain about Dr. McGruder's designation of Dr. Vourvopoulos as acting department head in his absence for three days. A petition signed by faculty members was presented. Dr. van der Meer then joined the meeting. Dr. Houston agrees that, at that point, he made a statement that "Wieb, if you keep up this action, and the University loses its license, I may have to ask you to resign" (TR 873). Dr. Scott recalls the statement as follows. At one point during the meeting, he had words with Dr. van der Meer, who then turned to him, apologized, and said "the real problem in the department is George Vourvopoulos." Dr. Houston then said to Dr. van der Meer: "Well, that may be so, but if you cause the college to lose its radiation license, then I may have to ask for your resignation." (TR

384). Because of Dr. Houston's obvious difficulty in recalling other matters, I do not credit his testimony that he had not seen Dr. van der Meer's April 19, 1994 memorandum at the time he made this statement. (TR 873). On the contrary, I find that his statement was a direct reaction to Dr. van der Meer's complaints about improper testing of the neutron generator.

Dr. van der Meer testified that he never received a specific answer to his April 19, 1994 memorandum, although he asked Dean Houston several times. (TR 92-93). The school year terminated in May, 1994. During the three summer months, little occurs at the school. (TR 507). Dr. van der Meer still assumed that an investigation would take place. (TR 96). In the Fall of 1994, when school resumed, he asked Dr. Houston again about the investigation. He began to feel frustrated, because, although he had no basis for believing that the matter was not being investigated, he had assumed he would hear something. (TR 97). Dr. Houston told him the radiation safety committee was looking into the matter, but was very vague. (TR 108). Dr. Houston never presented Dr. Vourvopoulos or Dr. Humphrey with Dr. van der Meer's written complaint with questions about the neutron test or asked Dr. Vourvopoulos to make a presentation to him. (TR 696, 790-791). Dr. Houston testified that he had never had an official meeting with Dr. van der Meer to respond to his April 19, 1994 complaint or discuss the radiation committee's findings and had just told him in passing in the hallway that everything was okay with the test. (TR 916-917). Dr. van der Meer did not recall any contact with Dean Houston in the hall. (TR 948).

In January, 1995, Dr. van der Meer was given a copy of the radiation safety committee minutes of May 2, 1994. (EX 12). At that point, he became quite concerned. He was not invited and had not heard about the meeting. (TR 97). In his view, the right questions were not asked and the only ones on the committee who were qualified to ask critical questions were Drs. Humphrey and Vourvopoulos, who had conducted the test he was questioning. (TR 107). He was most concerned because they said they knew there was not enough shielding but conducted the test anyway. (TR 109).

After Dr. Van der Meer saw the May 2, 1994, radiation safety committee minutes, he went to Dr. Houston and raised additional questions about the test. Dr. van der Meer's understanding was that Dr. Houston was going to speak to Dr. Buckman about his questions before discussing them with Dr. Humphrey but that Dr. Houston failed to do so. This made Dr. van der Meer increasingly frustrated. (TR 107, 113, 114).

In January, 1995, Dr. van der Meer began wearing a whistle to indicate that he planned to become a whistleblower. (TR 114). He contacted the faculty regent, Dr. Raymond Mendel, about his concern over the radiation hazard and his frustration about his attempts to have action taken on the matter. Dr. van der Meer went to Dr. Mendel's office two or three times and talked to him by telephone three times. Dr. van der Meer felt that the university's safety officer, Dr. Humphrey, should be replaced, and the university should conduct a more thorough investigation. (TR 459). Dr. Mendel believed that Dr. van der Meer was sincere about his concern over the safety issue but had a lot of animosity toward "the players" in the test, Dr. Vourvopoulos and Dr. Humphrey. (TR 475). Dr. Mendel advised Dr. van der Meer to stop wearing the whistle

because this was disruptive. (TR 460). He also advised Dr. van der Meer that, if he believed there was a safety hazard, he had an obligation to make any complaints he felt were necessary to the appropriate agencies and let them investigate. (TR 460-461). Dr. Mendel credibly testified, and I find, that he had nothing to do with Dr. van der Meer's forced leave of absence. (TR 478). Dr. Mendel telephoned Dr. Houston to advise of the contact by Dr. van der Meer, and his belief in Dr. van der Meer's sincerity. Dr. Houston told him there was no merit to Dr. van der Meer's complaint. (TR 480).

During January, 1995, Dr. van der Meer also met with Dr. Robert Haynes, Vice President for Academic Affairs. In a brief discussion in Dr. Haynes' office, Dr. van der Meer, who was wearing the whistle around his neck, stated that he was going to blow the whistle. (TR 833). He explained his concern that there had been radiation leakage during a test of the neutron generator, that Dr. Vourvopoulos and Dr. Humphrey had been in charge of the test, and that they had not followed proper procedure. (TR 834). According to Dr. Haynes, Dr. van der Meer seemed satisfied with his response that he would contact Dr. Houston.

After seeing Dr. Mendel, Dr. van der Meer stopped wearing the whistle. (TR 956). At this point, he felt that he had to file a complaint with the NRC, although he had hoped to resolve the matter in-house. (TR 137, 957). In mid-January, 1995, Dr. van der Meer also telephoned the president of the University, Dr. Meredith. He told Dr. Meredith that there had been a radiation leak in the physics department, and expressed his concern that Dean Houston, and Drs. Humphrey and Vourvopoulos, were covering up the problem. (TR 530). Dr. Meredith immediately telephoned Dr. Houston, who assured him that there was no problem with a radiation leak and complained to him about Dr. van der Meer's behavior, including his complaints about the neutron generator test. (TR 535-536; EX 26, ex A, p. 3). A few days later, on January 16, 1995, Dr. van der Meer mentioned the situation again to Dr. Meredith when he encountered him at an evening celebration of the Martin Luther King Holiday. (TR 534-5). On February 5, 1995, Dr. van der Meer wrote a letter to Dr. Meredith apologizing for the fact that he was going to take actions which would inconvenience the university about the radiation leak. He admitted candidly in the letter that he would not be pushing the matter of the radiation leak so hard if Dr. Vourvopoulos were not involved. (EX 14).

Dr. van der Meer testified that he was under stress during this period not only due to the situation in the department, but also because of his separation from his wife and mood swings, including excitement and depression. (TR 116). He had engaged in numerous conversations about these problems with his department head, Dr. McGruder, his close friend, which he deemed confidential. (TR 193, 426). He was also worried about preparing for presentations he was going to make at a professional meeting in San Francisco. The Biophysical Society Meeting was scheduled to meet from February 10-16, 1995. He was given a week off from classes to make his preparations. (TR 140, 936). On January 31, 1995, he also began seeing a local psychiatrist, Dr. Nassr. (TR 116-117, EX 21).

During January, 1995, Dr. van der Meer had confrontations with Dr. Vourvopoulos, Dr. Humphrey, and Dr. Houston. The confrontation with Dr. Houston occurred on January 12,

1995, and involved the denial of a sabbatical. After Dr. Houston jumped up and told Dr. van der Meer to get out of his Office, Dr. van der Meer expressed that he was f____g mad. (TR 164, 891). Dr. Houston testified that he would normally have taken disciplinary action against a faculty member for using such language. (TR 893). Dr. van der Meer also initiated a discussion with Dr. Humphrey to try to persuade him to stop his lawsuit against his friend, former department head Coohill. During the discussion, Dr. van der Meer threatened to “destroy” Dr. Humphrey on the witness stand, gave him an obscene gesture, and also said “f____k you.” (TR 643-645). Later in the month, on January 31, 1995, while wearing the whistle around his neck, Dr. van der Meer followed Dr. Humphrey down the hall to his office. Their offices are on the same hallway. Dr. van der Meer told Dr. Humphrey he was incompetent, should have known better than to go through with the test of the neutron generator, and should have stopped Dr. Vourvopoulos from performing the test. He also expressed his continuing distress about the lawsuit against Dr. Coohill. (TR 653-655). Dr. Humphrey then complained to Dr. McGruder. (TR 656-657).

Dr. van der Meer also initiated a conversation with Dr. Vourvopoulos and asked him to intercede to stop the lawsuit against Dr. Coohill. When he realized that Dr. Vourvopoulos was not taking his concerns seriously, he became angry and asked Dr. Vourvopoulos to leave his office. (TR 129-130). On January 13, 1995, Dr. van der Meer saw Dr. Vourvopoulos in the hall and told him that he would get even with him. (TR 131). Dr. Vourvopoulos testified that Dr. van der Meer followed him to his office. (TR 774). On January 31, 1995, Dr. van der Meer followed Dr. Vourvopoulos in the hallway again, for about 10 yards, urging a public debate about the safety issue. (TR 137, 778-779). He testified that he was still wearing a whistle at that point, and, rather than taking his complaint to the NRC, desired to work out the issue of the generator test internally. Dr. Vourvopoulos complained both to Dean Houston and Dr. McGruder. (TR 779-780, 440). Dr. McGruder then accused Dr. van der Meer of “stalking.” Dr. van der Meer denies that he was stalking Dr. Vourvopoulos; rather, their offices were close together in the same hall and he was following Dr. Vourvopoulos down the hall trying to make a point. (TR 137, 442, 957).

Dr. McGruder conceded that he had not seen Dr. van der Meer following Dr. Vourvopoulos. (TR 442). He testified that he did not believe Dr. van der Meer had threatened anyone physically, although he was concerned that situations such as “what I call stalking” could have led to a physical confrontation. (TR 448-449). There was other testimony that, although Dr. van der Meer was excited and frustrated, he was not a physical threat to anyone. (TR 253, TR 286 459). There is no evidence in the record that Dr. van der Meer touched any other faculty member as Dr. Dorman had done.

During January, 1995, Dr. van der Meer’s department head, Dr. McGruder, reported “inappropriate behavior” to Dr. Houston by Dr. van der Meer and that Dr. van der Meer had marital problems, but suggested that no action be taken at the time because he “wished to continue listening to him as a friend” (EX 26, ex A, p. 3). Dr. McGruder felt that Dr. van der Meer needed a vacation to get away and calm down. (TR 898). There is no evidence that he suggested a forced leave of absence.

Dr. Houston met with Dr. Haynes and the Associate Vice President for Academic Affairs, Dr. Peterson. He also met with the university attorney Deborah Wilkins, who told him to make a written record of everything that had happened, and to have all the other people involved do the same, so that everything could be documented. (TR 898).

On February 2, 1995, Dr. Houston prepared a draft memorandum to academic vice president Haynes about Dr. van der Meer, entitled "inappropriate faculty behavior." (EX 26, ex A). Dr. Houston's February 2, 1995 memo expressed his view that, "since April of 1994", Dr. van der Meer had "sporadically exhibited inappropriate behavior uncharacteristic of a university faculty member" which he thought had "progressed to a point where physical action against some faculty members in the Department of Physics and Astronomy may be imminent." The memorandum cited several examples of Dr. van der Meer's "unacceptable behavior," including repeated accusations "that Drs. Douglas Humphrey and George Vourvopoulos have jeopardized the safety of students, hypothetical homeless individuals and possibly themselves by activating a neutron generator in the basement of TCCW on February 22, 1994 without proper safety procedures and measurements." (EX 26, ex A). His opinion was that "Dr. van der Meer is unable to function effectively as a productive faculty member at the present time and should be relieved of his duties as soon as possible and until such time as his current behavior is corrected."

On February 9, 1995, two campus policemen hand-delivered to Dr. van der Meer a letter dated February 8, 1995 signed by Academic Vice President Haynes. (EX 16). The letter stated, in pertinent part:

Over the past several months University Officials have observed a continuing course of conduct on your part which clearly violates University policies. I am aware that your conduct has been such that it could be a violation of the law as well, in that you have made threatening remarks to various members of the University faculty and have followed certain individuals in a manner which is harassing and threatening to them. These same individuals feel frightened and threatened by your conduct and presence on campus.

Although you have been counseled and advised to cease this behavior, you have continued in this regard. This conduct has been exhibited in the presence of faculty, staff and students and cannot be allowed to continue.

The letter placed Dr. van der Meer on a paid leave of absence from his employment effective immediately until August 1, 1995, and prohibited him from coming on to the WKU campus, participating in the Physics department search committee, or acting on behalf of the university pending further notification. The letter also related that Dr. van der Meer had stated to unnamed members of the University Administration that he was suffering from "a mental illness," and required him to seek treatment immediately, to provide a medical release prior to resuming his duties, and to undergo an independent medical examination if required by the university "[b]ecause your conduct poses a potential danger to the campus community." During

January, 1995, Dr. van der Meer had told Dr. Houston, Dr. McGruder and Dr. Scott that he had ups and downs like a manic depressive, but testified that this was a self diagnosis. (TR 117, 443, 401).¹

The February 8, 1995 letter was delivered to Dr. van der Meer in his classroom by two campus policemen in the presence of students and Dr. Buckman. The policemen removed Dr. van der Meer from his classroom, and then escorted him to his office and off campus. (TR 147-151, 811-831). Dr. Haynes, who had been academic vice-president for 12 years, testified that he could not recall any other faculty member who had been placed on leave of absence without his consent prior to Dr. van der Meer (TR 855). A student, Christopher Wheatley, who witnessed the removal (TR 340) testified that he subsequently heard rumors that Dr. van der Meer was a bad seed who needed to be removed, and that Dr. van der Meer had been involved in sexual molestation or selling or smuggling of drugs. (TR 350-354). Dr. Buckman testified that he would never forget the event. (TR 250-253). Dr. van der Meer testified that it was the worst day of his life. (TR 150).

The February 8, 1995 letter was drafted by university attorney Deborah Wilkins. Dr. Haynes testified that she presented the letter to him and he signed it. (TR 852-853). He did not make a personal investigation of the allegations in the letter. (TR 837). Dr. Houston testified that he did not compose the letter, but that he and Dr. McGruder had input. (TR 909-910). Dr. Meredith testified that he had no input into the letter. (TR 560).

I do not find Dr. Meredith's assertion in this regard credible. After an employee in the Water Quality Control laboratory wrote a letter to a newspaper complaining about the cost of a chair President Meredith purchased for his office, he contacted her personally to tell her that this was incorrect information. (TR 541-543). After Dr. Ray Mendel, a faculty regent, attempted to secure information about the university's financial situation in order to fulfill what he regarded as his duties as a member of the university's governing board to develop and make decisions about policy (TR 461-462), Dr. Meredith asked his Dean about Dr. Mendel's teaching load (TR 465), which was subsequently increased. (TR 465, 537-538). After Gary Dilliard, a long time tenured professor in the WKU Biology Department, wrote letters to a newspaper and the Board of Regents complaining about the lack of budgetary support for academic programs in the Biology Department, he received a personal admonishing telephone call from Dr. Meredith. (TR 335, 540). In light of the evidence of Dr. Meredith's concern about the university's public image, and his personal involvement in matters considerably more minor than the unprecedented removal of a tenured faculty member from campus, I find his assertion implausible. Dr. Meredith must have been aware from his conversations with Dr. Houston of the magnitude of Dr. Vourvopoulos's grants in the nuclear energy area and the potential threat to the university's

¹ Dr. Vourvopoulos testified that, in April 1994, Dr. van der Meer "opened up to him" and said that people were fantasizing about killing Dr. Vourvopoulos, and that he, Dr. van der Meer had separated from his son and was a manic depressive as were other people in the Department. Dr. Vourvopoulos testified that Dr. van der Meer was not threatening (TR 760-761) and there is no evidence that Dr. Vourvopoulos made a complaint at the time.

nuclear license posed by Dr. van der Meer's complaints. (See EX 26, ex A, par. f).

Dr. Houston testified that, prior to delivery of the February 8, 1995, letter, he never had an official meeting with Dr. van der Meer to tell him to calm down. (TR 919-920). Dr. McGruder also testified that, prior to delivery of the letter, none of the individuals involved in the February 8, 1997 letter had talked to Dr. van der Meer directly about the matter, or given him any opportunity to respond to the allegations about his behavior. No one had told him that he was going to be removed from campus or gave him an opportunity to tell his superiors that he was already receiving psychiatric counseling. (TR 524). Dr. Houston testified that he wished he had known complainant was receiving psychiatric help. (TR 923-924). Dr. van der Meer also testified that none of his superiors had ordered him to see a psychiatrist or reprimanded him. (TR 118).

Dr. McGruder testified that, although he had told Dr. van der Meer his actions could get him fired, he had not done so officially as head of the department. (TR 445). Rather, he said to Dr. van der Meer "You know, you're my friend. I have to let you know the vibrations I'm feeling." (TR 500). The university attorney, who prepared the letter forcing Dr. van der Meer's leave of absence and barring him from campus, did not give him a warning or have any personal contact with him. Dr. van der Meer did not meet her personally until the Wage Hour Investigation was conducted. (TR 153).

On February 20, 1995, Dr. van der Meer addressed a written complaint to the U.S. Nuclear Regulatory Commission ("NRC") about the April 1994 test. He also expressed concerns that Dr. Humphrey, as the university's radiation safety officer, had misinformed state authorities, and that the location to which the generator had been moved was not secure, it was unclear that there was sufficient shielding, and there were no radiation signs at the new location. (EX 18, 19). Because Kentucky is an "agreement state program," NRC referred his complaint to Dr. John Volpe, manager of the Kentucky Radiation Control Branch in the Cabinet of Human Resources. (EX 59).

The investigation of Dr. van der Meer's complaint was handled by Ms. Vicki Jeffs, Supervisor of the Radioactive Materials Section of the Radiation Control Branch. Dr. Vourvopoulos and Dr. Humphrey were interviewed on June 1, 1995 at the state office in Frankfurt Kentucky. Input was received from Dr. Buckman. (EX 32a; TR 701-702). No on-site inspection was made. A surprise inspection had been made previously. The surprise inspector had no reason to know about Dr. van der Meer's complaint about the test on the neutron generator, because the generator had been moved to a new location and there was no discussion of the test. The on-site inspection revealed only record keeping violations. (EX 32a; TR 666-669).

On June 12, 1995, Dr. Volpe wrote to the N.R.C. stating that the investigation of Dr. van der Meer's complaint indicated that no violations of any requirements of Kentucky Administrative Radiation Regulations 902 KAR 100 or conditions of the radioactive material license issued to WKU had occurred. Dr. Volpe stated that, "[a]lthough not a violation, I feel

the participants should have roped off the area of concern and placed dosimeters to obtain a second party record of the test." (EX 30).

On June 22, 1995, an article appeared in a local Bowling Green newspaper, the Daily News, following the Wage and Hour Division's finding of a violation in this case. (EX 40). Dr. van der Meer told the paper that he had complained that Dr. Vourvopoulos had used the neutron generator without proper shielding, and that, two days after requesting minutes of the radiation safety committee, he had been removed from campus. University attorney Wilkins told the newspaper that Dr. van der Meer was removed from campus "because his harassing and stalking behavior was endangering employees' safety." She stated that Dr. van der Meer would be allowed back on campus if he complied with the university's terms, including having a psychological evaluation.

On June 22, 1995, Dr. van der Meer wrote to Dr. Volpe, expressing concern about the thoroughness of the investigation, and setting forth a series of what he believed to be unanswered questions. (EX 32a (g).) On August 14, 1995, Dr. van der Meer addressed a Freedom of Information Act request to the Radiation Control Branch requesting information about the February 21, 1994 test (erroneously stated to be 1995). (EX 32a-b). Dr. Volpe answered the request on September 21, 1995, informing Dr. van der Meer, *inter alia*, that shielding reports were not required to be submitted for the generator installed in 1994, but that Kentucky regulations prohibit the use of sources of radiation when radiation levels exceed two (2) millirems in any one (1) hour in an unrestricted area. (EX 32a (a).) Dr. Buckman testified that he felt that both the university and the state had conducted an inadequate investigation. (TR 243).

With respect to Dr. van der Meer's psychiatric treatment, Dr. Donald Nassr saw Dr. van der Meer initially on January 31, 1995. At that session, Dr. van der Meer indicated that he had separated from his wife 2 weeks earlier, had a family history of mental illness and believed he might have a mood disorder. Dr. Nassr elected to see him for several sessions for exploratory psychotherapy, ongoing evaluation, and possibly more definitive treatment. He saw Dr. van der Meer on February 7, 13 and 22, and March 14, 1995. Dr. Nassr stated that, after each examination, he had found no evidence of mental illness. "The patient was always civil, polite, rational, highly intelligent, and showed normal emotional control and appropriate affective display." He therefore supported Dr. van der Meer's subsequent election to discontinue treatment. (EX 21).

Dr. Max Kinnaman saw Dr. van der Meer for a psychiatric evaluation at the request of university attorney Wilkins. On August 22, 1995, he reported to Ms. Wilkins that Dr. van der Meer had experienced previous episodes of major depression, that this condition was in remission, that he was not presently suffering from a major psychiatric illness, displayed no evidence of psychosis or dangerousness to himself or others, was functioning well and was mentally and emotionally capable of resuming his position at WKU without restrictions. (EX 73).

After the semester of forced leave, Dr. van der Meer returned to campus and resumed his teaching duties. (TR 152). When asked to state the cost to him of his removal from campus, he testified that he lost \$250 because he had to pay for a replacement to teach the chess club, an extracurricular activity (TR 155). He testified that he was unable to promote his new book at the professional meeting he expected to attend on February 10, 1995 because he was not allowed to attend the meeting. He had no idea what that had cost him, however. (TR 156). He also described various personal costs which he stated were difficult to value, including loss of professional development, and students pretending not to know him. (TR 157-159).

In discussing his motivation for complaining about the test of the neutron generator, Dr. van der Meer candidly admitted that, while he was concerned about the safety aspects of the test, he was also motivated by his concern that Dr. Vourvopoulos and Dr. Humphrey were insulting him professionally, and that Dr. Humphrey was pressing a lawsuit against his friend former Department Head Coohill, "in a very mean way making sure that Dr. Coohill can never, ever work again." (TR 109-111). He described his motivation as 80% concern about safety and 20% desire for revenge on Drs. Vourvopoulos and Humphrey. (TR 212-213).

DISCUSSION

Under the burdens of proof and production in whistleblower proceedings, the complainant first must make a prima facie showing that protected activity motivated the employer's decision to take adverse employment action. In order to establish a prima facie case, a complainant must show that he or she engaged in protected activity, that he or she was subject to adverse action, and that the respondent was aware of the protected activity when it took the adverse action. The complainant also must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Scerbo v. Consolidated Edison Company of New York, Inc., 89-CAA-2 (Sec'y Nov. 13, 1992).

I find that complainant engaged in protected activity by complaining about possible radiation leakage due to the February 22, 1994 on-campus testing of the neutron generator in informal and written complaints to Dean Houston in April 1994; to Department Head Charles McGruder by copy of his April 19, 1994 memorandum to Dean Houston; in inquiries to Dean Houston in Fall, 1994; in inquiries to Dr. Houston in January 1995; in a meeting with Dr. Robert Haynes, Vice President of Academic Affairs in January 1995; in a telephone call and personal inquiry to University President Meredith in January 1995; in ongoing conversations with Dr. McGruder in 1994 and 1995; and in his February 5, 1995 letter to WKU President Meredith. These actions are protected because they constitute notifications to his employer of an alleged violation of the Act pursuant to Section 211(a)(1)(A) and that he was about to commence a proceeding under the Act pursuant to Section 211(a)(1)(D). Although the respondent argues and the complainant concedes that a part of the impetus for his protected activities was his animus toward Drs. Vourvopoulos and Humphrey, there is no requirement in the Act that protected activities result from good motivations. I find that, despite his admitted animus, Van der Meer had a good faith and reasonable belief that the February 22, 1994 test violated accepted safety norms and was a genuine hazard to the public. His belief was based on his own

professional experience, and on the opinion of his colleague, Dr. Buckman, a specialist in radiation shielding, that the neutron generator had been operated with insufficient shielding to protect the public from statutorily excessive levels of radiation. It is undisputed that the generator, when operated, emitted radiation at an excessive rate, although not an excessive total amount, for the shielding in the room where it was housed.

I find that complainant was subjected to adverse action by his enforced removal from campus by campus policemen and involuntary paid leave of absence. I do not accept the University's argument that this action was not adverse. Van der Meer's conditions of employment were radically changed, and not for the better. The university argues, based on Dr. McGruder's testimony, that this was a compassionate action the purpose of which was to give complainant a chance "to heal himself." (WKU brief at p. 25). This is not credible in light of the evidence that the officials involved in the action against Van der Meer made no prior investigation of his perception of events prior to taking the action, did not inquire as to whether he had sought psychiatric help, and gave him no warning that he needed to do so. In addition, Dr. Houston's draft memorandum to Dr. Haynes, which accurately reveals his motivation, says nothing about helping Dr. Van der Meer. Rather, it focuses on relieving him of his duties until his "unacceptable behavior" stops. True compassion for the complainant would have dictated some preliminary action short of expelling him from campus.

I find that an inference of discrimination, i.e. a causal connection between the complainant's complaints and the adverse action, is raised by complainant's removal from campus on February 9, 1995, the month after his complaints to Dr. Haynes, Meredith and Houston, and only four days after his written complaint to WKU President Meredith. This is a sufficient temporal nexus between a protected activity and adverse action to raise an inference of causation. See Mandreger v. the Detroit Edison Co., 88-ERA-17 (Sec'y Mar. 30, 1994).

Accordingly, complainant has established a prima facie case of discrimination. The employer may rebut this showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The employer, however, bears only a burden of production of rebuttal evidence; the ultimate burden of persuasion of the existence of retaliatory discrimination rests with the complainant. Hence, the complainant must establish that the reason proffered by the employer is not the true reason. The complainant may persuade directly by showing that the unlawful reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is not credible. Shusterman v. Ebasco Servs., Inc., 87-ERA-27 (Sec'y Jan. 6, 1992); Larry v. Detroit Edison Co., 86-ERA- 32 (Sec'y June 28, 1991); Dartey v. Zack Co., 80- ERA-2 (Sec'y Apr. 25, 1983).

I find that the employer has met its burden to produce evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons, i.e. Dr. van der Meer's making "threatening remarks to various members of the university faculty and [following] certain individuals in a manner which is harassing and threatening to them." (EX. 16, February 8, 1995 letter).

Thus, the issue remaining for determination is whether the complainant has met his ultimate burden of persuasion by showing that this reason is not the true reason, either because an unlawful reason more likely motivated the employer or the employer's proffered explanation is not credible. As discussed below, I find that an unlawful reason more likely motivated the employer and that the employer's proffered explanation is not credible.

It is undisputed that the loss of the university's nuclear license due to improper practices would threaten the \$400,000 in federal contracts secured by Dr. Vourvopoulos. As Dr. Houston stated on April 20, 1994, if the university lost its nuclear license, van der Meer would have to go. Dr. Houston's statement was made during a meeting related to faculty displeasure with Dr. Vourvopoulos's temporary chairmanship of the Physics Department, immediately after Dr. van der Meer joined the meeting. I find that this statement represented Dr. Houston's choice between Dr. van der Meer and Dr. Vourvopoulos in case of any threat to the university's nuclear license. Dr. Houston would have had no reason to make such a statement in an unrelated meeting if he were not aware of and disturbed by Dr. van der Meer's complaints about proper testing of and resulting leakage from the neutron generator, including his written complaint dated April 19, 1995. I conclude that Dr. Houston's statement reflects his motivation to retaliate against Dr. van der Meer.

In addition, Dean Houston's February 2, 1995 draft memorandum to Academic Vice President Haynes specifically includes Dr. van der Meer's complaints about the neutron generator test as an example of inappropriate behavior which justified immediately relieving him of his duties. I find that this memorandum demonstrates Dean Houston's true motivation in complaining to Dr. Haynes about Dr. van der Meer's behavior. Dean Houston was the motivating force behind complainant's punishment, as Dr. Haynes expressly relied on him in approving and signing the February 8, 1995 letter.

I also find that the respondent's proffered reasons as stated in the February 8, 1995 letter are not credible for other reasons. First, the letter exaggerates Dr. van der Meer's harassing and threatening activity beyond any reasonable view of the facts. The evidence at trial demonstrated that only two faculty members complained about being harassed and threatened, Drs. Vourvopoulos and Humphrey. They did so as a result of their encounters with Dr. van der Meer during January, 1995, when he was publicly pressing his complainants with top university officials about the neutron generator test which Drs. Vourvopoulos and Humphrey had conducted. Since both were intimately connected with the \$400,000 federal contract which permitted the purchase of the neutron generator, they had an obvious motivation to discredit Dr. van der Meer's complaints about their conduct of the test by discrediting him personally. I also find it difficult to credit either Dr. Vourvopoulos's or Dr. Humphrey's expressed concerns that they were afraid of Dr. van der Meer. Neither Dr. Vourvopoulos nor Dr. Humphrey had the demeanor on the witness stand of individuals easily put in fear. It was unrefuted that Dr. Vourvopoulos had boasted about his power at the university.

University officials were well aware of the long standing conflicts in the Physics Department, including the conflict between Dr. van der Meer and Drs. Vourvopoulos and

Humphrey. The Physics Department was simply not a collegial place of employment. While Dr. van der Meer was outspoken about his desire to “ruin” Drs. Vourvopoulos and Humphrey, it was undisputed that they had also attempted to “ruin” him by publicly attacking his courses as watered down and unsuitable for physics majors. Because the respondent failed to take an even-handed approach to their complaints by investigating Dr. van der Meer’s side of the story, I conclude that respondent’s officials were aware that Dr. van der Meer was not a real threat to Drs. Vourvopoulos and Humphrey.

While the February 8, 1995 letter refers to violations of university policies, the respondent failed to identify the specific policies violated. In addition, respondent failed to follow its well-established policy of informal resolution of faculty grievances before taking formal action with respect to the grievances of Dr. Vourvopoulos and Dr. Humphrey about Dr. van der Meer’s alleged harassing and threatening activity. No university official other than Dr. McGruder raised these incidents with Dr. van der Meer prior to the action against him. Dr. McGruder failed to counsel Dr. van der Meer about these incidents in his capacity as department head, or to take other action in his capacity as department head to informally resolve the grievances of Dr. Vourvopoulos and Dr. Humphrey.

The university also argues that Dr. van der Meer’s complaints were not protected activity because they were expressed in a disruptive fashion, relying on the case of Hochstadt v. Worchester Foundation for Experimental Biology, 545 F.2d 222 (1st Cir. 1976). In that case, brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § § 2000e, the court held that the plaintiff’s opposition to discriminatory practices lost its protected status because “it went beyond the pale of reasonable opposition activity.” 545 F.2d at 230. That is not the situation here. Although Dr. van der Meer was quite persistent about his concerns about the generator, I do not find his conduct unusually or inappropriately disruptive toward higher level officials to whom he presented his complaints about the generator and requests for an internal investigation. I find that he had reason to be persistent, based on his frustration about not receiving an answer to his prior complaint to Dr. Houston, and his good faith concern about the operation of the generator. His swearing at Dr. Houston in January 1995, while regrettable, was unrelated to his complainants about the generator. His January 1995 confrontations with Drs. Van der Meer and Humphrey, while inappropriate, were not so different in kind from prior conflict in the Physics Department as to elicit special action against Dr. van der Meer in the absence of his complaints about the neutron generator.

Hochstadt also differs from the instant case in that the complainant in Hochstadt was the primary cause of conflict among the employer’s professional staff. Here, in contrast, it was agreed that conflict in the Physics Department had existed long before Dr. van der Meer became concerned about the test of the neutron generator, and that Dr. Vourvopoulos, Dr. van der Meer’s nemesis, was the polarizing figure in the Physics Department.

In conclusion, I find that the respondent, WKU, has violated the ERA.

REMEDY

The Act provides the following remedies: affirmative action to abate the violation including reinstatement and back pay; compensatory damages; and costs and expenses including attorneys' and expert witness fees. 29 C.F.R. § 24.6(b)(2). It is undisputed that he has lost no pay. Dr. van der Meer requests attorneys' fees and costs, a complete expungement of any record of the adverse action against him from his personnel file, payment of medical expenses, and compensatory damages of \$250,000 for lost income, for mental and emotional distress caused by the respondent's action, and for damage to his reputation and future livelihood. (Complainant's Brief at 6).

Complainant has failed to introduce any proof of medical expenses resulting from the respondent's violation, so there is no basis for awarding such expenses. Although he believes he has sustained injury to reputation and livelihood, he was unable to place a value on this injury.

Compensatory damages may also be awarded for emotional pain and suffering and for mental anguish. DeFord v. Secretary of Labor, 700 F.2d 281, 288 (6th Cir. 1983). Where appropriate, a complainant may recover for emotional stress and mental anguish that is the proximate result of the unlawful adverse action. See Busche van der Meer Burkee, 649 F.2d 509, 519 n.13 (7th Cir. 1981). Emotional distress cannot be presumed, and compensatory damages for mental and emotional distress cannot be awarded without proof that such injury actually was caused. Carey v. Phipps, 435 U.S. 247, 263-4 (1978). The complainant has the burden of proving the existence and magnitude of subjective injuries. Busche v. Burkee, 649 F.2d at 519; Blackburn v. Metric Constructors, Inc., 86-ERA-4 (Sec'y Oct. 30, 1991). The testimony of medical or psychiatric experts is not necessary. See Thomas v. Arizona Public Service Co., 89-ERA-19 (Sec'y Sept. 17, 1993).

I note that, in other cases before the Secretary, awards of between \$500 and \$40,000 for emotional distress alone have been made, depending on the circumstances of the case. See Doyle v. Hydro Nuclear Services, 89-ERA-22 (ARB Sept. 6, 1996); Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (Dep. Sec'y Feb. 14, 1996); Gaballa v. The Atlantic Group, Inc., 94-ERA-9 (Sec'y Jan. 18, 1996); Fleming v. County of Kane, State of Illinois, 898 F.2d 553 (7th Cir. 1990). Complainant has proven substantial mental and emotional distress by the evidence in the case, including his credible testimony that the day of his removal from his classroom was "the worst day of his life." His enforced removal from his classroom by campus policemen in the presence of students and a colleague, the suddenness and lack of warning of the university's action against him, and his expulsion from campus for an entire semester despite his status as a tenured professor, in light of his prior outstanding evaluations and undisputed value to the Physics department, all support a substantial award. Accordingly, an award of \$40,000 is recommended for compensatory damages for emotional distress.

Expungement of Dr. van der Meer's personnel record is also an appropriate remedy. In order to completely abate the violation, the university is ordered to post the decision and order in this case on appropriate bulletin boards for a period of not less than sixty days. See Zinn v. University of Missouri, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996). Additionally, in order to

counter public statements in the local press by the university that complainant was removed from his position because of “harassing and stalking,” the university shall, without comment, release the decision and order in this case to the press.

Attorneys’ fees will also be awarded, in an amount to be determined.

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED THAT Respondent, Western Kentucky University, be ordered to:

1. Expunge any reference to the adverse action against the complainant from all university files;
2. Post the decision and order in this case on appropriate bulletin boards for a period of not less than sixty days;
3. Without comment, release the decision and order in this case to the press;
4. Pay to complainant compensatory damages in the amount of \$40,000;
5. Pay to complainant all costs and expenses, including attorney fees, reasonably incurred by him in connection with this proceeding. Thirty days is hereby allowed to complainant’s counsel for submission and service of a properly documented application for attorney fees. Respondent shall file any objections within fifteen days of receipt of such application.

EDITH BARNETT
Administrative Law Judge

Washington, D.C.
EB:bdw

